

ANNEX 2-E
MODEL FRAMEWORK FOR POLICY STATEMENTS
TO BE ISSUED BY ANTITRUST ENFORCEMENT AGENCIES
REGARDING WAIVERS OF CONFIDENTIALITY¹

PREAMBLE

This section should indicate the agency's willingness to use an internationally accepted model waiver to facilitate cooperation and its commitment to maintaining appropriate protection for confidential business information throughout this process. It would also affirm that the agency is not obligated to exchange or discuss confidential business information, and it may decline to do so where it is not in the public interest of the jurisdiction or for any other reason. Further, this section contemplates where a waiver has been granted, that the agency would affirm that if it becomes aware that confidential information has been improperly disclosed that it will promptly advise the other relevant agencies and/or parties of the disclosure so that its significance and implications for further information-sharing can be assessed.

VOLUNTARINESS OF WAIVERS

This section should confirm that the agency views waivers as a voluntary process which may be entered into when agencies and the parties believe that it will facilitate the review of a particular transaction or investigation. While agency personnel may identify cases and issues where they believe a waiver will be useful, the agency should make clear that no negative inference will be drawn from a party's decision not to grant a waiver.

EXISTING STATUTORY CONFIDENTIALITY PROTECTIONS

This section should describe and cite the applicable domestic confidentiality legislation/regulations with respect to: (i) disclosure of confidential information received from a merging party; and (ii) disclosure of confidential information received from another antitrust enforcement agency during a merger review. Any specific gaps in the protection of confidential information should be clearly identified so that merging parties can make an informed decision regarding the incremental disclosure risks which could result from granting a waiver (or providing confidential business information directly to the agency).

This section also should explain how the domestic confidentiality legislation/regulations are interpreted and applied in practice. Key issues would include the **definition of confidential information** and the **scope of discovery rules** (including the agency's policy and practice with respect to the use of confidential business information in complaints and accompanying court papers), **freedom-of-information**

¹ At the invitation of the Advisory Committee, the Working Group of the Antitrust and Trade Committee of the International Bar Association prepared a recommended framework for policy statements. This model is based on their submission.

laws or other **exemptions** which may result in disclosure of information received from another agency or provided directly by the parties.

CUSTOMARY PRACTICES

This section would affirm the agency's intention to refuse to disclose information except to the extent it is legally required to do so, to use best efforts to resist disclosure to third parties (including the assertion of any privilege claims or disclosure exemptions which may apply), and to provide such notice as is practicable prior to disclosure of any confidential business information. This section also would explain how concepts such as using best efforts to resist disclosure to third parties are implemented on a domestic basis. This section also would state the agency's practice with respect to the destruction of documents at the end of the investigation.

The policy statement should be updated when there are material developments in the manner in which particular provisions of the model waiver are interpreted and applied.